IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1534

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY, N. J.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY–APPELLATE DIVISION

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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I. BRIEF STATEMENT OF REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Board of Education of Union Township, Union County, New Jersey opposes the petition for *certiorari* herein for the reasons hereinafter stated.

A. *No federal question was decided*

Rule 19 of this Court provides that a "writ will be granted only where there are special and important reasons therefor." Generally, a federal question must have been decided in the state court in such manner as to require consideration here.

The New Jersey Courts decided no federal question in this case because none was presented to them.

The present Petitioner did not raise any federal question before the Commissioner of Education, the State Board of Education, the Appellate Division of the Superior Court of New Jersey, or the New Jersey Supreme Court.

B. *The state decision is in accord with decisions of this court*

The decision complained of is the admission of some hearsay in an administrative proceeding. As will be seen, the decision of the state courts and agencies is in accord with decisions of this court and the weight of authority.

C. *Petitioner acquiesced*

The Petitioner acquiesced in the presentation of the hearsay, had adequate opportunity to subpoena for cross-examination the witnesses whose statements were admitted, and did not do so. Further, Petitioner introduced in her defense precisely the same type of hearsay.

D. *Petitioner received a full and fair hearing*

The transcript of the testimony consists of nearly 800 pages in seven volumes. There were seven hearing days. A large number of exhibits were introduced into evidence. Defendant was represented by outstandingly able counsel. Full opportunity was afforded for cross-examination, for presentation of evidence, subpoenas were available to her. Every available legal and factual defense was presented on her behalf.

E. *There was persuasive non-hearsay evidence*

Adequate non-hearsay evidence was presented to establish sufficient charges against Petitioner to require her dismissal. The truth of the charges was established beyond a reasonable doubt. (P.A. 4a-16-23)

II. RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether any hearsay may be placed in evidence against a tenured teacher in an administrative hearing leading to her removal from employment:

> (a) Where the teacher has the opportunity to call the witnesses whose statements are placed in evidence for cross-examination but makes no effort to do so.
>
> (b) Where the hearsay would be admissible at a jury trial under an exception to the hearsay rule. N.J. Rules of Evidence Rule 63(4) and Rule 63(12); Rules of Evidence, United States Courts etc., Rule 803.
>
> (c) Also where the hearsay would not be admissible at a jury trial but it is provided by statute (P.B.-7, N.J.S.A. 52:14B-10) that the parties shall not be bound by rules of evidence, the hearsay is trustworthy and persuasive, and merely corroborative of competent evidence. (Opinion of Appellate Division of Superior Court of N.J., P.A. 4a to 8a).

2. Whether under any provision of the First, Sixth, or Fourteenth Amendments to the Constitution of the United States the procedure referred to in Question 1 is a deprivation of due process of law.

3. Whether the First, Sixth, or Fourteenth Amendments prohibit a state administrative agency from receiving the testimony of an expert that trainable children lack the mental capacity "either to fabricate an untruth or to conspire to tell the same untruth" (Pa7a–3-5), when there is no objection thereto and no contradiction thereof, and whether the same may be considered as a factor in weighing the evidence.

III. RESPONDENT'S COUNTER-STATEMENT OF FACTS

At p. 4-8 *et. seq.* of Petitioner's Brief it is said:

> ". . . but, in the instant case, the findings of dismissal were predicated upon a totally invalid and completely unsubstantiated theory of child psychology which alleges that handicapped children are incapable of fabricating any kind of story and that complete reliance can be placed upon any matter which such children relate, even when transmitted through third persons . . ."

It is not the fact that "the findings of dismissal were predicated" upon the premise described. Also the premise was substantiated. The finding that the Petitioner was guilty of eight of fourteen charges of gross misconduct as a teacher, including two instances of striking children, was grounded upon much direct and circumstantial evidence. Only three of the eight charges were supported by any hearsay (P.A. 4a-16-23).

The Appellate Division spelled out the bases for accepting the hearsay and finding it trustworthy in the surrounding circumstances and the testimony of several sets of parents and four teachers and administrators (P.A. 6a-28 to 7a-9). The Court added: (P.A.7a-2-5)

> "Coupled with the testimony that these declarants, trainable children, lacked the mental capacity either to fabricate an untruth or to conspire to tell the same untruth, they are clearly admissible."

There was testimony by an expert to that effect. At p. 263 of Vol. II of the transcript (noted by the Appellate Division, P.A. 6a-8-12) Frank A. Moretti, Director of Student Personnel Services in the Union Township Schools,

whose qualifications as an expert were established without dispute, testified as follows:

> "Trainable children cannot think abstractly. For instance, they would not have the cognitive power to be able to say this is a fact and this is not a fact, and make up a story which will be a lie, in effect, because they have not cognition in that area."

This testimony was not objected to and no testimony or evidence of any kind was presented to the contrary. No authority to the contrary is cited by Petitioner, who relies on mere assertion.

The Commissioner of Education, as well as the Hearing Examiner were educators with substantial expertise. The Commissioner held (P.A.-48a and 49a):

> "The Commissioner is very much aware of the mental capabilities of trainable children. Any attempt to elicit competent testimony from these pupils would have been emotionally distressing, and would have inflicted unnecessary anguish and suffering on the minds of these pupils. Trainable pupils are unable to properly understand or cope with formalized questions of the type that would have to be posed in an adversary hearing. The Board's determination not to seek their testimony was a sound educational decision which prevented further hardship on these unfortunate pupils. Therefore, the Commissioner agrees with the hearing examiner's decision to permit this hearsay testimony in order to make his final determinations and recommendations.
>
> In *State v. Graziani*, 60 N.J. Super. 1 (App. Div. 1959); affirmed 31 N.J. 538 (1960); *cert.* denied 363 U.S. 830 (1960) the Court quoted from *State v. Greenberg*, 105 N.J.L. 383, 385 (E. & A. 1928), when it held that '. . . circumstantial evidence is often 'more certain, satisfying and persuasive than direct

evidence.'' See also, *State v. Carbone*, 10 N.J. 329, 339 (1952); *State v. Corby*, 28 N.J. 106, 119 (1958); *State v. Fiorello*, 36 N.J. 80 (1961). In *Graziani*, the Court also held that:

> 'The probative value of circumstantial evidence is determined by the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life . . . .' (at p. 13)

In the instant matter there is an abundance of circumstantial evidence from which the Commissioner can draw the reasonable inference that respondent committed the offenses as detailed in Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11.

The Commissioner holds that the record herein discloses a pattern of conduct by respondent which is unprofessional and constitutes unbecoming conduct for a teacher. Specifically, respondent has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore, respondent must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements."

Nowhere in the case was an "irrebutable presumption" (P.B. 7, heading) or a "conclusive presumption" (P.B. 8-23-24) applied as alleged by Petitioner.

IV. THE EXCLUSION OF ALL HEARSAY IS NOT A REQUIREMENT OF DUE PROCESS

Respondent concedes that Petitioner was entitled to due process in the conduct of the administrative proceedings resulting in her discharge from employment. She was given a full and fair hearing with the right to subpoena witnesses and to confront and cross examine witnesses against her.

The hearsay exclusionary rule is not a provision of the Constitution of the United States nor has it been read into the Due Process clause. *Richardson v. Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L.Ed.2nd 842 (1971); *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2nd 213 (1970); *Consolidated Edison Co. v. National L. Rel. Bd.*, 305 U.S. 197 at 229-230, 83 L.Ed. 126 at 140, 59 S. Ct. 206 at 217 (1938); *Willapoint Oysters v. Ewing*, 174 Fed. 2d 676 at 690 (C. A. 9th, 1949); *cert. denied*, 338 U.S. 860, 70 S. Ct. 101, 94 L.Ed. 527 (1949); *Jacobowitz v. United States* (U.S. Court of Claims, 1970) 424 Fed. 2d 555, 6 A.L.R. Fed. 61; Annotation: Hearsay Evidence in Proceedings before Federal Administrative Agencies, Ernest H. Schopler, S.J.D., 6 A.L.R. Fed. 76 *et. seq.*

The right to confrontation of witnesses in so far as applicable is satisfied by the right to subpoena opposing witnesses for cross examination, failure to do which estops the Petitioner from claiming a deprivation of confrontation. *Richardson v. Perales* (*supra*); *Peters v. United States* (1969) 187 Ct. Cl. 63, 408 F.2d 719 at 723.

The hearsay in this case was reliable and such "as a reasonable mind might accept as adequate to support a conclusion." *Con. Edis. v. Nat'l. Relations Bd.* (*supra*). It was also supported by direct, eyewitness evidence, by Petitioner's own testimony and manner of testifying, and by surrounding circumstances.

Most of the evidence was legally admissible under the well recognized spontaneous exclamation and physical condition exceptions to the hearsay rule. N.J. Rules of Evidence, *R.* 63 (4) and *R.* 63 (12); Fed. Rules of Evidence, as amended July 1, 1975, *R.* 803 (2) and (3); Wigmore on Evidence, (Third Edition) Vol. VI, §1746, pp. 134, 135, 139, §1751 pp. 155 and 156.

V. PETITIONER IS ESTOPPED BY HER TRIAL STRATEGY

As set out in her brief to the Commissioner (P.A.-14a and 15a), Petitioner failed to call the children for cross-examination and used hearsay of statements of other children in her defense (transcript 596-597).

Having made this choice as a stratagem, Petitioner may not now rely upon it for reversal.

In *Henry v. Mississippi,* 379 U.S. 443, 13 L.Ed.2d 408, 85 S. Ct. 564 (1965) the United States Supreme Court in an opinion by Mr. Justice Brennan, held, as well summarized in headnote 8, as follows:

> "Any deliberate choice by defense counsel to delay objection to tainted evidence either to discredit witness offering evidence or to invite error will amount to a waiver binding on defendant and preclude him from decision on merits of federal claim with respect to admission of tainted evidence, either in state or federal court."

To like effect is the holding of the New Jersey Supreme Court in *State v. Gainer*, 48 N.J. 376, 225 A.2d 578 (1967).

A similar holding in *Richardson v. Perales* is referred to at page 7 *supra.*

VI. CONCLUSION

It is respectfully submitted that there is no special or important reason for reviewing this case. There is no moral or legal reason for this Court to intervene. Petitioner was fairly and justly, even solicitously treated. The welfare and safety of the children who would be in her charge and who can hardly speak for themselves required the action taken by the school authorities. That action was sustained by able and fair-minded State educational authorities, an intermediate appellate court of great competence, and was denied review by a State Supreme Court deeply sensitive to the rights of all.

The petition should be denied.

Respectfully submitted,

/s/ Howard Schwartz
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